

November 21, 2014

PUBLIC VERSION

Via Email and U.S. Mail

Ms. Lisa Saks
Ms. Lisa Boehley
Market Dispute Resolution Division
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20054

RE: *In the Matter of Worldcall Interconnect, Inc. a/k/a Evolve Broadband, Complainant v. AT&T Mobility, LLC, Defendant*, File No. EB-14-MD-011 – Reply.

Dear Ms. Saks and Ms. Boehley:

Worldcall Interconnect, Inc. (“WCX”) hereby submits for filing the Confidential/Highly Confidential versions of the Reply in the above-captioned complaint proceeding. WCX requests confidential and highly confidential treatment of certain information contained in the Reply, submitted pursuant to 47 C.F.R. §§ 1.726, 1.731, and the protective order entered in this proceeding.

WCX provides justification for the Confidential/Highly Confidential treatment of the Reply in the Appendix to this letter, pursuant to 47 C.F.R. §§ 0.457 and 0.459. In accordance with 47 C.F.R. § 1.731(b), WCX agrees that the Confidential/Highly Confidential information in the Reply may be disclosed to the persons listed in this subsection, including counsel of record for Defendant, to the extent necessary solely for the purpose of this action.

WCX is simultaneously submitting, under separate covers, a non-redacted (highly confidential), a partially-redacted (confidential), and a redacted version of the Reply. The non-redacted and partially-redacted versions of the Reply are marked “DO NOT RELEASE, NOT FOR INCLUSION IN THE PUBLIC RECORD” and “Confidential/Highly Confidential Information included pursuant to Protective Order, *Worldcall Interconnect, Inc. v. AT&T Mobility, LLC*, File No. EB-14-MD-011.” The redacted version of the Reply is marked “PUBLIC VERSION.” All versions of the Reply are the same except that, in the partially-redacted version, the highly confidential information has been omitted and, in the public version, the confidential and highly confidential information has been omitted. This cover letter does not contain any confidential/highly confidential information.

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WCX is simultaneously delivering two courtesy copies of the Reply (non-redacted, highly confidential) to Market Disputes Resolution Division staff via U.S. Mail.

Please do not hesitate to contact us with any questions using the information in the letterhead.

Respectfully,



Matthew A. Henry

W. Scott McCollough

McCollough Henry, PC

1250 S. Capital of Texas Hwy, Bldg 2-235

West Lake Hills, TX 78746

henry@dotlaw.biz

wsmc@dotlaw.biz

Tel: 512.888.114

Fax: 512.692.2522

Counsel for Worldcall Interconnect, Inc.

Enclosures

Copy to (via email and U.S. Mail)

James F. Bendernagel, Jr.

David L. Lawson

Paul Zidlicky

Thomas E. Ross.

Sidley Austin LLP

1501 K Street, N.W.

Washington, D.C. 20005

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APPENDIX

Confidentiality Request and Justification

WCX requests confidential and highly confidential treatment of specific information contained in the Reply associated with this correspondence. In accordance with 47 C.F.R. § 0.459(b) and in support of its request, WCX provides the following information:

47 C.F.R. § 0.457(d)

Information contained in the Reply is confidential and/or highly confidential and proprietary to WCX as “commercial information” not routinely available for public inspection or is otherwise confidential under Section 0.457(d). These materials constitute WCX’s business plans; network information; the identity of another carrier with whom WCX is negotiating a roaming agreement and the terms under negotiation; as well as the names of individuals with whom WCX is negotiating machine-to-machine (M2M) business partnerships. The Reply also contains discussion of information that the defendant marked confidential/highly confidential in the Answer and must be accorded confidential treatment. Therefore, in the normal course of Commission practice, this material should be considered “Records not routinely available for public inspection.”

47 C.F.R. § 0.459

Specific information included in WCX’s Reply is also subject to protection under 47 C.F.R. § 0.459, as demonstrated below.

Information for which confidential treatment is sought

WCX requests confidential treatment of specific information contained in parts of the Reply as containing confidential and/or highly confidential information. The confidential and/or highly confidential information includes WCX’s business plans; network information; the identity of another carrier with whom WCX is negotiating a roaming agreement and the terms under negotiation; as well as the names of individuals with whom WCX is negotiating M2M business partnerships. The Reply also contains discussion of information that the defendant marked confidential/highly confidential in the Answer and must be accorded confidential treatment. The information is identified as confidential/highly confidential when it appears within the submission, and pages containing confidential information have been marked pursuant to the October 9th order and the protective order in place in this proceeding: “DO NOT RELEASE, NOT FOR INCLUSION IN THE PUBLIC RECORD.” Consistent with the protective order, the material marked as protected also includes a legend designating the material as confidential.

Commission proceeding in which the information was submitted

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The information is being submitted in *In the Matter of Worldcall Interconnect, Inc. a/k/a Evolve Broadband, Complainant v. AT&T Mobility, LLC, Defendant*, File No. EB-14-MD-011.

Degree to which the information in question is commercial or financial, or contains a trade secret or is privileged

The material designated as confidential contains sensitive commercial information of complainant and defendant that WCX maintains as confidential. It includes WCX's business plans; network information; the identity of another carrier with whom WCX is negotiating a roaming agreement and the terms under negotiation; as well as the names of individuals with whom WCX is negotiating M2M business partnerships. The Reply also contains discussion of information that the defendant marked confidential/highly confidential in the Answer and must be accorded confidential treatment.

Degree to which the information concerns a service that is subject to competition

The confidential/highly confidential information that WCX seeks to protect is related to its provision of mobile wireless services. The mobile wireless industry is somewhat competitive.

How disclosure of the information could result in substantial competitive harm

Disclosure of the confidential information would result in substantial competitive harm because it would give competitors insight into WCX's business model; network construction, business plans; business relationships; as well as an advantage in future data roaming negotiations with AT&T.

Identification of any measures taken by the submitting party to prevent unauthorized disclosure

WCX has treated and treats the information disclosed in this material as confidential and/or highly confidential and has protected it from public disclosure to parties (other than Defendant and the Commission) outside of the company.

Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties

The designated information had not been previously made available to the public or provided to third parties (other than the Defendant and the Commission now).

Justification of the period during which the submitting party asserts that material should not be available for public disclosure

WCX cannot determine at this time any date on which this material should not be considered confidential/highly confidential or would become stale for purposes of the current

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action. Therefore, the information should be treated as confidential/highly confidential indefinitely.

Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted

Under applicable Commission and court rulings, the material in question should be withheld from public disclosure. Exemption 4 of the Freedom of Information Act, 5. U.S.C. § 552(b)(4), shields commercial or financial information.

PUBLIC VERSION

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
WORLDCALL INTERCONNECT, INC.)	
a/k/a EVOLVE BROADBAND,)	
Complainant)	File No. EB-14-MD-011
)	
v.)	
)	
AT&T MOBILITY LLC)	
Defendant)	

REPLY OF WORLDCALL INTERCONNECT, INC.

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Complainant)	File No. EB-14-MD-011
)	
v.)	
)	
AT&T MOBILITY LLC)	
Defendant)	

**WORLDCALL INTERCONNECT, INC. REPLY TO AT&T MOBILITY ANSWER
PACKAGE**

MATTHEW A. HENRY
henry@dotlaw.biz
W. SCOTT McCOLLOUGH
wsmc@dotlaw.biz
McCOLLOUGH|HENRY PC
1250 S. Capital of Texas Hwy Bldg 2-235
West Lake Hills TX 78746
512.888.1112 (V)
512.692.2522 (FAX)
Counsel for Complainant

November 21, 2014

EXECUTIVE SUMMARY

Despite all of the mutual finger-pointing and name calling, this proceeding is not about “bad faith.” The parties simply have fundamental disagreements about the policies imbued in the Roaming Orders and Roaming Rules.

AT&T believes the roaming rules are narrow, with only incidental impact, and they do not actually provide a meaningful mechanism for small rural wireless providers to participate in a seamless traditional market. AT&T contends that small providers are (or should be) completely foreclosed from emerging markets like M2M. AT&T sees “resale” behind every door; roamers are free-riders on the back of AT&T’s network pig. Roaming prices should be so high that roaming is never or only infrequently used. Home carriers must provide roaming at an extreme loss. The cost of roaming beyond a tiny percentage overwhelms the primary home use. Despite AT&T’s cramped vision of roaming, AT&T maintains that there are a multitude of available host providers that can stand in stead of AT&T, and any carrier that wants roaming can go to them for nationwide seamless connectivity. AT&T claims there is a wide array of fully-functional devices that will work on every band and every network. WCX does not need AT&T, and AT&T does not want to deal with WCX or any other “free-rider” for that matter.

WCX, of course, submits that this is nonsense. This Reply exhaustively shows why AT&T is wrong on every count. AT&T’s policy is wrong, its facts are wrong, its prices are grossly excessive and its proposals erect insurmountable entry barriers and would restrain trade. The numerous supposed alternative roaming suppliers are no such thing. None have nationwide footprints, and WCX is not interoperable with them at this time. There is no dizzying array of available multi-band devices that will work. There is not, in fact, even one that will work right now. AT&T is WCX’s only option.

The parties are at an impasse. WCX cannot proceed until the Commission decides the legal and policy issues so we know the rules of the road, and to avoid future litigation. The Commission must apply its policies and complaint factors to the particular circumstances, determine the appropriate price, and prescribe the contract terms.

These issues in particular predominate:

1. Does AT&T have any 20.12(d) automatic roaming obligations and if so what terms, conditions and prices should control for the interconnected services that will be provided through roaming? Price is important, but AT&T has proposed strict conditions and limitations on use that WCX strongly opposes.
2. What terms, conditions and prices should control for the non-interconnected services that will be provided through roaming? Price is important, but AT&T has proposed strict conditions and limitations on use that WCX strongly opposes.
3. Should WCX be forced to take AT&T's standard terms, which AT&T incorrectly claims numerous other carriers have accepted without complaint and still love, or should the roaming terms be crafted to address the particular circumstances at hand, including consideration of WCX's status as a small rural carrier with a limited wireless footprint and a single authorization in the 700 MHz band that is currently on Band 17?
4. Does WCX have the right to enter the emerging M2M and IoT markets and use roaming to serve home-based M2M and IoT customers and partners?
5. Is WCX seeking roaming for its home-based customers like WCX contends, or is WCX – as AT&T contends – seeking “back-door” “*de facto*” resale to non-residents to “piggy-back” on AT&T's network through the artifice of roaming?

This is one of the first roaming cases to be fully litigated at the Commission. It is precedential, and vitally important to WCX. WCX has no roaming capability at present and (contrary to AT&T's claims) no realistic alternatives other than AT&T.

WCX requests expeditious resolution so that WCX's existing and potential customers will soon be able to have the seamless nationwide connectivity envisioned by the roaming orders and rules.

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Reply to AT&T Introduction

Although AT&T pretends WCX has not provided sufficient documentation, it does not seriously contest the proposition that WCX does or will provide “interconnected voice and data” or interconnected messaging. Nonetheless, AT&T claims it has no obligation to provide “automatic roaming” (defined in rule 20.12(a)(2) and mandated by 20.12(d)).¹ AT&T’s focus and argument on the merits entirely pertain to “data roaming” under 20.12(e).

AT&T contends that it has “numerous” other agreements with “similar” terms, and the existence of these “arms-length” agreements provide conclusive evidence that the terms it has proposed to WCX are reasonable.² Indeed, AT&T argues that these other agreements render its proposed terms to WCX “presumptively commercially reasonable.”³ AT&T also asserts that WCX has many alternative potential sources of supply for roaming and therefore AT&T in fact has no obligation to provide roaming at all.⁴

AT&T also claims that WCX’s opposition to AT&T’s usage limits and restrictions reflects an effort to illicitly obtain “back-door resale” and/or “*de facto* resale.”⁵ In addition, AT&T levels an *in personam* attack on Mr. Feldman as an excuse to justify its hard-nosed negotiating position and its desire for vague but punitive audit and suspension terms.⁶

AT&T has not directly responded to WCX’s concerns about AT&T’s network management, content inspection and application identification practices, or what AT&T’s proposed contract says or implicitly authorizes. WCX continues to contend that while AT&T has

¹ AT&T Legal Analysis pp. 41-43.

² AT&T Legal Analysis pp. 3-4 provides one of the many places where AT&T makes this argument.

³ *Id.*

⁴ AT&T Legal Analysis pp. 14-15.

⁵ “Back-door resale” appears more than 52 times in AT&T’s Public Answering submission, and more are in the Confidential. “Piggy-backing” and “*de facto* resale” also warrant citation as “*passim*.”

⁶ AT&T Answer pp. 3, 18; AT&T Legal Analysis pp. 4-5; Meadors Decl. ¶54.

the right to protect its network from harm and manage congestion, its express and implied terms would allow it to inspect content, engage in application identification and priority decisions, and perform other acts in the name of network management that are unrelated to legitimate network security and congestion control.

I. The Parties

1. AT&T admits most of ¶1. With regard to AT&T's assertion that WCX has not provided documentary evidence that it is currently providing service WCX disagrees. Nonetheless, documentation is being provided as part of the Feldman Reply Declaration.⁷ Although AT&T does not mention this issue in its answer to ¶1 AT&T witness Meadors erroneously asserts in his Declaration (¶12) that WCX is a "subsidiary" of Worldcall, Inc. That is incorrect. There is admittedly some overlap in ownership of WCX and Worldcall, Inc. and thus WCX and Worldcall, Inc. are "affiliates" but from a corporate perspective WCX has no parent corporation and is not a subsidiary of Worldcall, Inc.⁸

2. AT&T admits ¶2 so no reply is necessary.

3. AT&T admits ¶3 so no reply is necessary.

II. Background

4. AT&T correctly notes that ¶4 is largely legal argument. The parties agree that roaming for interconnected voice and data services are Title II and subject to a higher standard but non-interconnected services are not Title II and enjoy a lower standard. The parties very much disagree, however, on whether AT&T must offer roaming for WCX's interconnected services under Title II if and to the extent AT&T's LTE network is being used for roaming. AT&T's position appears to be that LTE is and can only be used for non-interconnected data roaming, and

⁷ Feldman Reply Declaration pp. 63-81.

⁸ Feldman Reply Declaration p. 91.

Title II never applies. WCX demonstrates that AT&T's legal contentions are incorrect below and in WCX's Legal Analysis and Reply Findings of Fact and Conclusions of Law. In particular, WCX will show that its voice (via VoLTE), messaging and many of its planned "Machine to Machine" ("M2M") offerings are each an "interconnected service" (either voice or data) as defined in 47 C.F.R. 20.3 since all of them are "interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network" and WCX is offering this "interconnected service" because they "allow[s] subscribers to access the public switched network." The VoLTE, messaging and M2M services "access the public switched network" as defined in 47 C.F.R. §20.3 because they "use the North American Numbering Plan in connection with the provision of switched services." In particular, WCX's VoLTE, messaging and M2M services do or will rely on NANPA numbering resources for both addressing and routing.⁹ Since WCX's VoLTE, messaging and M2M services are or will be "interconnected" AT&T must offer "automatic roaming" for them, under Title II.¹⁰ It does not matter that AT&T will not know when a WCX customer is employing an interconnected service, and it does not matter that they will rely on AT&T's LTE interface-based network. WCX's interconnected voice and data services are by definition not commercial mobile data services because they are interconnected.¹¹ The rule definitions look to the nature of the service offered by WCX, not the technical nature of the transmission network that is used when roaming. If WCX is offering interconnected voice or data then AT&T's 20.12(d) automatic roaming obligation applies. If

⁹ Feldman Reply Declaration pp. 6 n 3, p. 25 n. 17, pp. 59, 81; Roetter Reply Declaration p. 13.

¹⁰ AT&T is clearly subject to 20.12(a)(2) and has never denied that it is. Thus AT&T must offer automatic roaming under 20.12(d) to any provider of interconnected voice or data services.

¹¹ See 47 C.F.R. 20.3, definition of commercial mobile data service: "Any mobile data service that is not interconnected with the public switched network..." Since WCX's VoLTE, messaging and M2M services are interconnected they do not meet the definition. WCX's interconnected voice and data services are covered by 20.12(d) automatic roaming, not 20.12(e) mobile data roaming.

WCX is offering non-interconnected commercial mobile data service then AT&T's 20.12(e) commercial mobile data roaming obligation applies.

5. WCX rejects AT&T's denial that the differing legal standards applicable to automatic and data roaming obscure problems faced by small rural providers with limited home area footprints. The rules may indeed have been justified without full consideration of how it would impact rural networks, but that is – as AT&T contends – not pertinent to this Complaint. WCX's complaint requests that Staff interpret and then apply the rules, as they are, after taking into account the individual circumstances and facts presented in the record. WCX is not asking staff to change the rules. Although WCX denies AT&T's legal assertion that WCX did not previously present any evidence, WCX presents additional evidence concerning its existing network and customers and its existing and contemplated services.¹²

6. WCX presented a lot of evidence concerning M2M technology and the fact that the M2M market is nationwide, that roaming is an imperative for a small provider and new entrant. WCX presents more evidence on these issues as part of this Reply package.¹³ WCX also rebuts AT&T's claim that there are “multiple alternatives” to AT&T for LTE roaming.¹⁴ WCX very much disagrees with AT&T's contention that the *Data Roaming Order* was not “designed for [the] purposes” of ensuring that “small, rural provider[s] [are] in position to offer service on terms that are comparable to those offered by the larger nationwide providers.” WCX also believes that one goal of the Commission's roaming rules is to ensure that rural providers can obtain “terms, conditions and prices [that] allow the rural provider to offer nationwide,

¹² Feldman Reply Declaration *passim*.

¹³ Feldman Reply Declaration *passim*; Roetter Reply Declaration p. 3.

¹⁴ Feldman Reply Declaration *passim*; Roetter Reply Declaration *passim*.

innovative and cutting-edge services”¹⁵ and that the Commission was aware that small rural providers’ “services will not be purchased by those residing in or having a significant connection to the small provider’s home area” if roaming terms contain unsustainable restrictions or excessive prices. The Commission allowed providers to bring a complaint seeking reasonable terms based on individual facts and circumstances if a small provider believed that AT&T was not offering reasonable and sustainable terms.

7. AT&T contends that the roaming rules do not require it to make roaming available to small providers that intend to offer open networks and open applications or wish to provide service to technology developers. Apparently AT&T believes it can force the entire industry to hew to its notions of closed networks and total control over applications and services. AT&T clearly wants to keep its current market dominance and retain all of the business with technology developers for itself. WCX denies that the roaming rules either explicitly or implicitly allow or even contemplate that result. To the contrary, the roaming rules were designed to maximize consumer choice, to encourage competition and to facilitate innovation, entrepreneurship and alternative business models.

8. AT&T feigns ignorance regarding M2M services’ potential as an excuse to deny. AT&T has, and many others have, however, extensively published about these topics,¹⁶ so while the lawyers may be uninformed AT&T itself cannot plausibly claim WCX is wrong. AT&T then “admits that ‘M2M’ and ‘Internet of Things’ projects’ can ‘involve multiple connected devices per each individual user or company’ and that such projects can be ‘designed and developed by innovative entrepreneurial companies and individuals.’” And it pretty much admits throughout its answer package that one of the main goals of its roaming terms (and the main reason it

¹⁵ Feldman Reply Declaration pp. 12-16, 24-40.

¹⁶ Feldman Reply Declaration p. 35; Roetter Reply Declaration p. 12.

opposes the RWA terms) is to exclude small rural providers from the M2M and Internet of Things markets as a consequence of either negotiated or FCC-imposed roaming terms. AT&T has, in effect, admitted that its roaming terms restrain trade. The *Data Roaming Order* expressly held that terms or resulting conduct pursuant to agreement terms that unreasonably restrains trade are commercially unreasonable.¹⁷ AT&T's use restrictions unreasonably restrain trade and are therefore commercially unreasonable.¹⁸ Terms that unreasonably restrain trade are also clearly unjust and unreasonable under §201.

9. AT&T again feigns ignorance about the expectations of applications and device developers. AT&T has never approved of open networks and the choices and advancements flowing from higher-layer applications and services that it cannot control. But it does make every effort to prevent roaming use of them by customers of other carriers. AT&T's contention that the *Data Roaming Order* explicitly or implicitly contemplated that AT&T could ban roaming use of applications and services – either interconnected or non-interconnected – is demonstrably incorrect.

10. AT&T weakly denies that it has the incentive and ability to prevent competitive entry, innovation, open use, or customer choice that it cannot control, rent-seek or monetize. The Commission knows better. The DOJ has directly found that AT&T has both the incentive and ability to engage in a wireless “foreclosure” strategy, and this Commission recently agreed.¹⁹ The Commission promulgated the data roaming rule precisely because AT&T “has largely

¹⁷ Data Roaming Order ¶¶45, 85.

¹⁸ They are also unjust and unreasonable when viewed through a Title II lens. As explained ____, Several of WCX's services are interconnected service and AT&T must provide automatic roaming for those services under Title II.

¹⁹ Report and Order, *In the Matter of Policies Regarding Mobile Spectrum Holdings, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 6133, 6155-6156, ¶43 (June 2, 2014) (quoting from U.S. Department of Justice Apr. 11, 2013 Ex Parte at 10-11 stating that “[T]he private value for incumbents in a given locale includes not only the revenue from the use of the spectrum but also any benefits gained by preventing rivals from improving their services and thereby eroding the incumbents' existing business.”).

refused to negotiate domestic 3G roaming arrangements until recently”²⁰ and noted that AT&T’s frenetic activity trying to reach agreements beginning in 2011 “may have been the result of large providers seeking to defuse an issue under active Commission consideration and may not accurately reflect the ability of requesting providers to obtain data roaming arrangements in the future if the Commission were to decide not to adopt any data roaming rules.”²¹ The Commission noted that when it refused to mandate in-home roaming but said it wanted carriers to nonetheless negotiate over in-home roaming terms, AT&T immediately refused to negotiate in-home roaming terms based on the lack of a Commission rule requiring it to do so.²² Unless some regulatory rule expressly mandates access to AT&T’s network then AT&T has and always will preclude access by competitors on any terms, much less reasonable terms. AT&T’s feeble denial is to be expected, but – like many of its other assertions – the claims and arguments are completely untethered from reality or any sensible reading of the roaming orders and the reasons for those rules.

11. AT&T steadfastly denies that using the prevailing retail rate for roaming will result in higher profits for roaming than retail service, even though it does not deny the underlying premises that clearly lead to that conclusion. If the incremental cost AT&T incurs while providing roaming is less than the incremental cost AT&T incurs for retail use (which AT&T does not deny) and if AT&T receives the same revenue for each then clearly its profits from roaming will be higher than its profit from retail. This alone shows that AT&T’s zeal to engage in anticompetitive market exclusion overrides any desire to earn legitimate profits.

²⁰ *Data Roaming Order* ¶¶25-26.

²¹ *Id.* ¶27.

²² *Id.* ¶27.

12. AT&T claims that the *Data Roaming Order* allows terms which prohibit M2M and Internet of Things uses while roaming. WCX disagrees. In the first place WCX's contemplated M2M and Internet of Things are interconnected service, so the *Data Roaming Order* does not really even govern. Instead, the automatic roaming rules promulgated in 2007 and 2010 apply. Setting that aside, and assuming arguendo (and wrongly) that the *Data Roaming Order* does apply, one still cannot plausibly draw that conclusion. AT&T asserts that WCX cannot be correct in its contention that AT&T's terms functionally prevent rural providers from participating in the M2M market, with the result that rural users interested in M2M will have to use national providers because "users in rural areas use providers other than national providers." It is true that some users in rural areas use rural providers, but it is also true that many rural users purchase service from national providers. The AT&T response, however, once again misses the point. M2M is a new market, and its potential is only now becoming evident. If rural providers cannot fulfill rural users' desires for M2M products that operate seamlessly on a nationwide basis then those who want M2M will have no choice but to use AT&T and the other three national providers. That is precisely what AT&T wants, and that is exactly the result its terms would obtain. WCX could be "AT&T rural lite" by providing basic voice and some measure of home-area only non-interconnected broadband data, but WCX cannot participate in the broader M2M market, or offer seamless data roaming capabilities to its users when they travel out-of-area under AT&T's proposed terms.²³

13. AT&T denies that it has the incentive to deny roaming on reasonable terms. Its own Answer package – including the arrogant and testy attitude exhibited throughout belies that claim. AT&T's proposed terms are obviously chock-full of restrictions and limitations, and

²³ Feldman Reply Declaration p. 8; Roetter Reply Declaration pp. 3, 13-16.

AT&T's Answer doggedly defends them using every possible logical fallacy and copious prevarication. Even AT&T would have to admit that its terms are not devised to encourage roaming use. The Answer package persistently defends on the grounds it does not have to allow roaming that is more than "incidental" because that would be "resale" – which AT&T also does not like. This is not a presentation from a company that is realistically trying to get people to buy lots of its roaming capability. Those that do not accept its adhesion contract and exercise their rights to file a complaint are then subjected to abuse and personal attacks. The only fair conclusion one can draw, therefore, is that AT&T would much prefer to deny roaming on any terms and it is only offering these terms because it is forced to make some offer by the rules and it will then defend them by any and all means necessary, including unfair means.

14. AT&T "denies that 'a carrier must offer nationwide domestic roaming that has no additional incremental fee, or in the case of M2M and 'Internet of Things' is no more than the prevailing retail rate for in-home usage.'" The market, however, belies AT&T's assertion. All of the nationwide carriers have eliminated separate roaming charges.²⁴ The few remaining entities that continue to impose a separate roaming charge are forced to do so because of the high prices and severe restrictions in their roaming agreements with AT&T. AT&T also supports its counterfactual denial by asserting that "WCX's allegation is inconsistent with the *Data Roaming Order*, which provides that 'the relatively high price of roaming compared to providing facilities-based services will often be sufficient to counterbalance the incentive to 'piggy back' on another carrier's network'" and then denying that "'the home carrier must absorb the cost of roaming charges imposed by other carriers if those charges exceed the incremental cost of supplying usage on the home network'" based on the claims that "[u]nder the Data Roaming Order, the

²⁴ Feldman Reply Declaration p. 6.

parties have significant flexibility in how they structure their relationships.” These arguments do not address the issue. WCX was observing that the market forces it to not separately charge for roaming because if WCX has a separate charge then users will not buy the product. This necessarily means WCX must offer a single package consisting of in-home usage and roaming usage for a single rate. That in turn means WCX must recover its own network costs *and* roaming costs entirely from revenues recovered within that rate structure, meaning that if the rate does not recover both costs (network and roaming) then WCX will operate at a loss. If WCX operates at a loss then it cannot finish building out its licensed footprint. High roaming costs therefore prevent WCX from competing and inhibit its ability to finish build-out. In this respect the result of an excessive roaming rate is the same as not having roaming at all. *See Data Roaming Order* ¶¶13-21. WCX is before the Commission asking it to do what it said would occur in a complaint case: “take into account factors including the impact on buildout incentives and the extent and nature of providers’ existing build-out in determining the commercial reasonableness of proffered terms” as part of “a case-by-case determination of commercial reasonableness” to obtain a result that both “preserves incentives to invest and protects consumers by facilitating their access to nationwide service.”²⁵ and “decide in the case of [this] specific dispute whether data roaming²⁶ should be provided in a particular instance, and on what terms, or whether the request is essentially a request for resale.”²⁷

²⁵ *Data Roaming Order* ¶22.

²⁶ As explained below, WCX contends that several of its services (including VoLTE, messaging and M2M) are “interconnected” services to which AT&T’s §20.12(d) automatic roaming obligations apply and thus as to those services the §20.12(e) “data roaming” rule does not apply. The Commission’s past statements about backdoorresale were made in the context of both automatic and data roaming, so the question whether WCX is seeking “resale” rather than “roaming” applies regardless of whether §20.12(d) applies or §20.12(e) applies to any given service.

²⁷ Order on Reconsideration and Second Further Notice of Proposed Rulemaking, *In re Reexamination of Roaming Obligations of Providers*, 25 FCC Rcd. 4181, 4233, ¶89 (2010) (“*Voice Roaming Reconsideration Order*”).

15. AT&T largely defers discussion of the proper interpretation the Commission's roaming orders to its Legal Analysis. WCX's reply to AT&T's Legal Analysis appears in part IX.C of this reply submission.

16. AT&T largely defers discussion of the proper interpretation the Commission's roaming orders to its Legal Analysis. WCX's reply to AT&T's Legal Analysis appears in part IX.C of this reply submission.

17. AT&T denies WCX's observation that "roaming terms that are financially, practically and operationally unsustainable to the small, rural carrier are not measurably different from having no roaming at all." Apparently AT&T disagrees with the proposition that commercial reasonableness can only be measured based on the particular facts and circumstances at hand and seems to believe that when a small rural carrier with limited spectral authorizations is involved it does not matter if the terms AT&T proffers terms that are financially, practically and operationally unsustainable to the small, rural carrier. In other words, AT&T seems to be saying that its terms can be commercially reasonable as to WCX even if WCX could not practically use them to offer seamless nationwide service to its customers like WCX contends is so in this case. WCX disagrees. The roaming orders consistently make clear that reasonableness is and can only be determined based on the individual facts at hand, in the case at hand, and what may be reasonable for one provider or group of providers may not be reasonable for another provider or like group of providers. WCX has alleged, and AT&T has not disproved, that AT&T's terms will not allow WCX to viably offer its contemplated services to its customers while they are roaming, particularly given the make-up of the citizenry and businesses in WCX's home area and their demonstrated propensity to "roam" into AT&T's licensed areas a substantial part of the time. Ultimately, AT&T disagrees with the Commission's expectation that AT&T might choose to

offer terms that are “so unreasonable as to be tantamount to a refusal to offer a data roaming.”²⁸

WCX has said that AT&T’s proposed terms are such, in WCX’s case. The Commission now must decide what terms would be reasonable in WCX’s case, after considering WCX’s particular situation. AT&T contends that case-by-case adjudication is unnecessary since it has other agreements with the same or similar terms²⁹ and WCX should just accept the one proposed for WCX even if they will not work for WCX. This argument must be rejected. Each situation is different, and what is “reasonable” depends on the specific facts and circumstances.

18. AT&T claims that it has no obligation to offer 20.12(d) automatic roaming to WCX for WCX’s “interconnected services.” AT&T appears to be arguing that its deployment of LTE renders 20.12(d) meaningless for any WCX roamer that uses an LTE interface, even when the WCX user is using a WCX interconnected voice or data service. WCX disagrees. AT&T largely defers discussion of the issue to its Legal Analysis. WCX’s reply to AT&T’s Legal Analysis appears in part IX.C of this reply submission.

19. AT&T claims that it has no obligation to offer 20.12(d) automatic roaming to WCX for WCX’s “interconnected services.” AT&T appears to be arguing that its deployment of LTE renders 20.12(d) meaningless for any WCX roamer that uses an LTE interface, even when the WCX user is using a WCX interconnected voice or data service. WCX disagrees. AT&T largely defers discussion of the issue to its Legal Analysis. WCX’s reply to AT&T’s Legal Analysis appears in part IX.C of this reply submission. With regard to AT&T’s claim that WCX has not

²⁸ *Data Roaming Order* ¶86, second factor. *See also Voice Roaming Reconsideration Order* ¶38 (non-exclusive list of consideration factors for automatic roaming complaints).

²⁹ AT&T’s Answer Package extensively relies on the alleged existence of other agreements to support its position. AT&T, however, did not provide any allegedly similar executed agreement as part of its Answer package. Further AT&T objected to WCX’s Interrogatories 2, 4 and 5 that sought production of them. AT&T has not proven its contention they are “the same” or “similar” to the AT&T terms before the Commission in this case. Nor can AT&T insist all of these are reasonable and give rise to a presumption of reasonableness as to WCX if neither WCX nor the Commission can see them and make an independent assessment.

supplied sufficient “documentary support” WCX disagrees, but WCX provides more information about its network, services and business plans in this Reply.³⁰

20. AT&T claims that it has no obligation to offer 20.12(d) automatic roaming to WCX for WCX’s “interconnected services.” AT&T appears to be arguing that its deployment of LTE renders 20.12(d) meaningless for any WCX roamer that uses an LTE interface, even when the WCX user is using a WCX interconnected voice or data service. WCX disagrees. AT&T largely defers discussion of the issue to its Legal Analysis. WCX’s reply to AT&T’s Legal Analysis appears in part IX.C of this reply submission.

21. AT&T claims that it has no obligation to offer 20.12(d) automatic roaming to WCX for WCX’s “interconnected services.” AT&T appears to be arguing that its deployment of LTE renders 20.12(e) meaningless for any WCX roamer that uses an LTE interface, even when the WCX user is using a WCX interconnected voice or data service. WCX disagrees. AT&T largely defers discussion of the issue to its Legal Analysis. WCX’s reply to AT&T’s Legal Analysis appears in part IX.C of this reply submission. With regard to AT&T’s claim that WCX has not supplied sufficient “documentary support” WCX disagrees, but WCX provides more information about its network, services and business plans in this Reply.³¹

III. History of Negotiations Between the Parties

22. AT&T denies that there are “several research facilities associated with major universities” within WCX’s licensed areas. WCX provides further proof for its assertion as part of this Reply.³² AT&T denied WCX’s assertion that a “large portion of the population of CMA 667 commutes to other locales” based on a lack of proof, even though WCX provided 2010

³⁰ Feldman Reply Declaration *passim*.

³¹ Feldman Reply Declaration *passim*.

³² Feldman Reply Declaration p. 21.

census information and reports as part of its complaint demonstrating that, for example, 21.5% of the population in one county in WCX's area spends the day in locations outside the county, and 59.3% of the "workers" in that county do a daily commute. WCX attached the census report for that county on Second Amended Complaint page 1010, and offered to provide the entire Census report for Texas upon request. Page 917 ¶8. AT&T's denial is frivolous. WCX demonstrates the falsity of AT&T's claim that "[t]here are numerous other providers operating both in the regions adjacent to CMA 667 as well as nationally from whom WCX could obtain broadband data roaming service that would be compatible with WCX's network" as part of this Reply package.³³ WCX also notes that even if alternatives are available that does not remove AT&T's obligation to provide roaming under either 20.12(d) or (e). The availability of alternatives bears on one of the nonexclusive factors for assessing reasonableness of the response in the context of a particular case, but alternatives do not completely eliminate the underlying and separate obligation to provide roaming on reasonable terms.³⁴

23. AT&T demands more proof that WCX has in fact deployed LTE services in CMA 667 using Band 17 and wants more information about WCX's present customer base and existing and planned services. While WCX insists it has more than adequately provided support for the assertions in its Complaint, WCX is providing more evidence as part of this Reply.³⁵ This Reply package also further demonstrates that "to provide a service that is both competitive and

³³ Feldman Reply Declaration pp. 40-53, 81-85; Roetter Reply Declaration pp. 13-16, 18-19, 23-25.

³⁴ *Voice Roaming Reconsideration Order* ¶39, factor 8 and preceding explanatory text ("Below, we provide additional guidance on factors the Commission may consider when resolving such roaming disputes that are brought before it – specifically in determining whether a request is reasonable and whether the host carrier's response to the request is reasonable and not unreasonably discriminatory. Each case will be decided based on the totality of the circumstances, such that no particular factor will be dispositive"); *Data Roaming Order* ¶86, factor 10, and preceding explanatory text ("We emphasize that each case will be decided based on the totality of the circumstances. With that in mind, we clarify that, to guide us in determining the reasonableness of the negotiations, providers' conduct, and the terms and conditions of the proffered data roaming arrangements, including the prices, we may consider the following factors, as well as others.")

³⁵ Feldman Reply Declaration *passim*.

commercially viable, it is essential that [WCX] establish a roaming arrangement with AT&T.”

With regard to AT&T’s assertion that “there are numerous other providers with which WCX could establish roaming relationships” this Reply package demonstrates that AT&T is wrong.³⁶

WCX also notes that even if alternatives are available that does not remove AT&T’s obligation to provide roaming under either 20.12(d) or (e). The availability of alternatives bears on one of the nonexclusive factors for assessing reasonableness of the response in the context of a particular case, but alternatives do not completely eliminate the underlying and separate obligation to provide roaming on reasonable terms.³⁷

24. AT&T admits most of the allegations in Second Amended Complaint ¶24, except that AT&T denies that its indication it is not interested in obtaining roaming from WCX “functionally turns any potential agreement into a one-way arrangement.” WCX admits that AT&T’s template terms have provisions for reciprocal roaming but they obviously would have no effect if AT&T never actually roams on WCX. WCX also does not understand how AT&T can deny that “this choice had important consequences to the commercial reasonableness of AT&T’s proffered terms.” The impact is obvious: if AT&T does not roam on WCX’s network then it will not ever pay WCX and therefore there will be no roaming revenue to offset roaming costs, in whole or in part. The commercial reasonableness of AT&T’s terms, conditions and prices can and must be assessed with the understanding that they will apply only when WCX

³⁶ Feldman Reply Declaration pp. 40-53, 81-85; Roetter Reply Declaration pp. 13-16, 18-19, 23-25.

³⁷ *Voice Roaming Reconsideration Order* ¶39, factor 8 and preceding explanatory text (“Below, we provide additional guidance on factors the Commission may consider when resolving such roaming disputes that are brought before it – specifically in determining whether a request is reasonable and whether the host carrier’s response to the request is reasonable and not unreasonably discriminatory. Each case will be decided based on the totality of the circumstances, such that no particular factor will be dispositive”); *Data Roaming Order* ¶86, factor 10, and preceding explanatory text (“We emphasize that each case will be decided based on the totality of the circumstances. With that in mind, we clarify that, to guide us in determining the reasonableness of the negotiations, providers’ conduct, and the terms and conditions of the proffered data roaming arrangements, including the prices, we may consider the following factors, as well as others.”)

roams on AT&T because there will never be an instance when AT&T roams on WCX. Any rational assessment of AT&T's terms must take this one-way nature into account.

25. There are no substantive disagreements between the parties regarding the averments in Second Amended Complaint ¶25. In fact, WCX very much agrees with AT&T that “the principal points of dispute were the same issues that currently divide the parties: usage restrictions and roaming rates.” WCX was not saying the points of dispute were minor or had gone away; rather WCX was explaining that it deferred pursuit of a roaming agreement pending initial network build-out, customer acquisition and drafting of its own roaming terms because AT&T opposed consideration of substance based on the fact that WCX had not built a network, had no customers and did not have its own set of terms. WCX did those three things and resumed the process. AT&T can no longer raise those three arguments as a reason for further delay.

26. WCX produced sufficient information to prove that it has “spent significant capital over the past two years and has now completed much of its [network] build-out”; that (a) WCX has “surpassed the Commission’s build-out requirements as outlined in Auction 73,” (b) its “Evolved Packet Core is in place, fourteen radio sites are installed and operational, and WCX is currently providing retail service from ten of them,” and (c) “WCX also has seven additional enodeB units in its staging area.” Nonetheless, WCX provides more information on these factual issues as part of this Reply. WCX also provides further support for the proposition that WCX’s ability to “viably provide continued and additional retail services to more customers” depends on a roaming agreement with AT&T that has reasonable terms” and that “further expansion will occur on a slower schedule – or not at all – until WCX can obtain commercially reasonable roaming

terms.”^{38,39} WCX has already addressed AT&T’s repetitious claim it has no roaming duties because WCX supposedly has alternatives.

27. WCX produced sufficient information to prove its contentions in Second Amended Complaint ¶27 concerning tentative arrangements and the fact they are contingent on securing reasonable roaming, but provides even more evidence as part of this Reply.⁴⁰ AT&T’s response that WCX is free to contract with technology intensive businesses and other advanced technology customers “on its own network” wholly fails to address the fundamental fact that WCX cannot secure such contracts if it cannot also offer roaming capability as part of any arrangement with those technology companies.

28. AT&T denies that it considers Amazon to be an MVNO and cites to Meadors Declaration ¶41. Meadors actually relegates the denial to one sentence in footnote 65. AT&T chose to not explain how it categorizes Amazon, but the implication is that Amazon is engaging in some kind of “resale” even if it is not an “MVNO.” Meadors ¶41. Therefore, if and to the extent AT&T wants to prohibit WCX from allowing a WCX resale customer service to engage in roaming, then AT&T has now clarified that WCX could not enter into a relationship with “another Amazon” that would involve any roaming use. AT&T has admitted that its proposed terms would prohibit WCX from serving another Amazon (however characterized), and would prevent WCX from allowing resale of WCX services. WCX also notes that AT&T is conflating the difference between WCX “reselling” AT&T’s services, and WCX having a service that can be resold by others and includes roaming capability. If WCX allows resale of its services (which it

³⁸ Feldman Reply Declaration *passim*.

³⁹ The Commission has already found that small rural providers without viable roaming terms will have difficulty providing competitive service and will also be unable to further invest in their home networks. *Voice Roaming Order* ¶28; *Voice Roaming Reconsideration Order* ¶¶21-23 (in the context of in-home roaming); *Data Roaming Order* ¶¶13-21. AT&T’s disagreement is not with the propositions WCX asserts but instead actually lies with the Commission’s past recognition that those propositions are true.

⁴⁰ Feldman Reply Declaration ¶___; Feldman Reply Exhibits ____.

clearly can do, even though the rules do not mandate resale) and if a resold service is used while roaming on AT&T's network that does not mean that WCX is somehow "reselling" AT&T's service. Roaming is different than resale. If a customer has a legitimate connection to WCX's home area (residency, conducting significant business, a physical presence) and purchases WCX's home-based service, then it is buying WCX's service, not AT&T's service. That does not change if the WCX customer (or the customer of a WCX reseller) roams on AT&T's network. This is particularly so under the specific circumstances at hand. AT&T's provision of "roaming" will involve only authentication on the network and then routing to the interconnection with WCX. AT&T will not provide any voice telephony functions or higher-layer functions. AT&T will not be doing the same things as it does for its retail customers. This cannot be "resale" (or even "back-door resale")⁴¹ of AT&T's service as a matter of law.

⁴¹ AT&T's Answer Package uses various combinations of a reference to "back-door" resale in more than 52 times in the Public version. Only a few of AT&T's references quote the actual words used by the Commission. AT&T justifies its usage restrictions on the "back-door" or "*de facto*" statements made by the Commission when discussing roaming in different contexts. For example in *Data Roaming Order* ¶88 the actual words were "...we are concerned that construing the rule we adopt as allowing a roaming provider to engage in unauthorized use of a competitor's brand name recognition and/or service quality reputation as a means of differentiating the roaming provider's own service may indeed encourage the use of roaming as *de facto* resale. The Commission has previously stated with regard to automatic roaming for voice and data services for CMRS providers that 'automatic roaming obligations can not be used as a backdoor way to create *de facto* mandatory resale obligations or virtual reseller networks.'" (notes omitted). Put in context, the Commission was saying that a roaming carrier should not improperly take advantage of or publicly leverage the host carrier's brand name recognition or service quality reputation. That statement had nothing to do with the *volume* of roaming use. *Voice Roaming Reconsideration Order* ¶35 said "[w]e also disagree with AT&T's contention that elimination of the home roaming exclusion would create *de facto* mandatory resale obligations. The automatic roaming obligation imposed in the *2007 Roaming Order* under Sections 201 and 202, and that we expand here with the elimination of the home roaming exclusion, is not intended to resurrect CMRS resale obligations. The Commission's mandatory resale rule was sunset in 2002, and, as the Commission previously stated, the automatic roaming obligations cannot be used as a backdoor way to create *de facto* mandatory resale or virtual reseller networks. We find that our actions herein in eliminating the home roaming exclusion will not effectively change the Commission's policy on CMRS resale obligations. While resale obligations are intended to offer carriers the opportunity to market a competitive retail service without facilities development, such a resale product would not serve our goals of promoting facilities-based competition, the development of spectrum resources, and the availability of ubiquitous coverage." (notes omitted). That discussion reveals that the Commission understands that "resale" involves sale of a finished product without the use of the retail carrier's own facilities. WCX is, of course, a facilities-based provider. The *Voice Roaming Order* ¶51 said "[f]inally, we also determine that the automatic roaming obligation under Sections 201 and 202 and the home roaming exclusion are not intended to resurrect CMRS resale obligations. CMRS resale entails a reseller's purchase of CMRS service provided by a facilities-based CMRS carrier in order to provide resold service within the same geographic market as the facilities-based CMRS provider. We note that the Commission's mandatory resale rule was sunset in 2002, and

29. WCX produced sufficient information to prove its contentions in Second Amended Complaint ¶¶29 concerning the purposes behind and work expended by RWA to develop the RWA Model Agreement. Nonetheless, WCX is providing more information about that topic in this Reply.⁴² AT&T's denial of the assertion that it claimed the Commission should not proceed to consider and resolve the major disputed issues in 2011 because WCX had not proposed its own set of terms is belied by the documents from that period. *See* Second Amended Complaint p. 593, containing the sentence where AT&T so claimed.

30. Second Amended Complaint ¶¶30-39 contain the background discussion of the parties' dealings because such averments are required by the compliant rules. Although AT&T and WCX each have their own positions on the other party's willingness to truly negotiate and compromise on substance, the bottom line is that it no longer matters. WCX is not asserting an individual and separate cause of action alleging AT&T violated any duty to negotiate in good faith. It is questionable whether the roaming rules even impose any such duty. Even if there is such a duty "[t]he parties' inability to reach either an interim or a final [] agreement stemmed not from any misconduct, but rather from an honest disagreement about what constitutes [reasonable terms, conditions and prices and what constitutes reasonable use] under the specific facts and applicable law here."⁴³ In other words, both parties firmly believe they are in the right and the disagreement can and will be resolved only through the Commission's dispute resolution process. To be clear

automatic roaming obligations can not be used as a backdoor way to create *de facto* mandatory resale obligations or virtual reseller networks." (notes omitted). The context there related to selling service to customers that do not reside, conduct business or have a physical presence in the carrier's home area. The Commission in each instance was in fact distinguishing "resale" from roaming by a home carrier's own customers who have a connection to the home area and use the service in the home area but also travel. In none of these paragraphs did the Commission say or even hint that it intended to allow a limit on the amount of roaming by customers of a home carrier, or the amount of roaming use a home carrier is to be allowed.

⁴² Feldman Reply Declaration pp. 88-91.

⁴³ *See, e.g., North County Communications Corp. v. MetroPCS California, LLC*, 24 FCC Rcd 3807, ¶18, n. 64 (Enf. Bur., Mar. 30, 2009).

WCX does claim that, among other things, AT&T failed to offer reasonable terms and failed to accept reasonable terms but is not directly asserting AT&T failed to act or negotiate in good faith. Second Amended Complaint ¶¶41A-D. WCX does not assert that AT&T unduly delayed or stonewalled the course of negotiations.⁴⁴ The simple fact is that the primary issues of dispute between the parties have precluded any meaningful resolution of contract terms and conditions. The parties ultimately agreed to disagree and both concurred that a complaint filing would be necessary so the Commission could interpret and apply its roaming rules in WCX's specific circumstances, because continued negotiations would not be fruitful until the major issues were resolved through adjudication under the roaming complaint rules. Second Amended Complaint p. 302. WCX produced sufficient information to prove its contentions in Second Amended Complaint ¶¶30 concerning its satisfaction of the Commission's build-out requirement and factual matters related to the RWA Model Agreement. Nonetheless, WCX is providing more information about those topics in this Reply.⁴⁵

31. WCX produced sufficient information to prove its contentions in Second Amended Complaint ¶¶31 concerning the purposes behind and work expended by RWA to develop the RWA Model Agreement. Nonetheless, WCX is providing more information about that topic in this Reply.⁴⁶

32. WCX denies AT&T's assertion that it has not taken a position on the RWA Model Agreement or its appendices "because of WCX's refusal to negotiate with AT&T." The negotiation record demonstrates that WCX repeatedly tried to negotiate with AT&T over the disputed issues, and both the RWA terms and AT&T's terms. Second Amended Complaint pp.

⁴⁴ See *Data Roaming Order* ¶81.

⁴⁵ Feldman Reply Declaration pp. 88-91.

⁴⁶ Feldman Reply Declaration pp. 88-91.

309-408. AT&T expressly refused to talk about the RWA Model terms on August 1, 2014 in negotiations with WCX based on the decision to address the RWA Model terms solely in the T-Mobile proceeding. Second Amended Complaint p. 404. Nowhere in that communication does AT&T base the refusal on any alleged failure to negotiate by WCX. AT&T did subsequently agree to discuss the RWA terms,⁴⁷ but during the conference call during which that was to occur both sides ended up deciding that the primary issues of dispute between them precluded any meaningful resolution of contract terms and conditions. The parties agreed to disagree and both concurred that a complaint filing would be necessary so the Commission could interpret and apply its roaming rules in WCX's specific circumstances, because continued negotiations would not be fruitful until the major issues were resolved through an adjudication under the roaming complaint rules. Second Amended Complaint p. 302. Again, WCX is not asserting a failure to negotiate in good faith or contending that AT&T unduly delayed or stonewalled the course of negotiations.

33. The negotiating record demonstrates that AT&T did refuse to provide answers to WCX's inquiries. WCX notes, however, that this allegation in the background section was included because the rules required WCX to discuss the parties' pre-complaint discussions. WCX, again, is not asserting a failure to negotiate in good faith or claiming that AT&T unduly delayed or stonewalled the course of negotiations. With regard to AT&T's denial that its 2014 terms mirrored its 2011 terms in all material respects, the Staff can make their own assessment.⁴⁸

34. WCX denies that it did not act in good faith, and reiterates that it is not alleging AT&T violated any duty of good faith negotiation or unduly delayed or stonewalled the course of

⁴⁷ See Second Amended Complaint p. 333, 335.

⁴⁸ Compare Second Amended Complaint pp. 456-502 (2014 terms) with pp. 812-849 (2011 terms). See also AT&T Legal Analysis pp. 112-12 (admitting AT&T's 2011 and 2014 proposed terms had the same price and use restrictions.)

negotiations. The parties have strongly-held legal and policy differences that could not be settled through negotiation and must be resolved in this adjudication. “Good faith” is not an issue.

35. AT&T’s arguments in this paragraph ignore the requirements in Rule 1.720(a)(8).

WCX’s request that AT&T commit to engage in settlement discussions and be ready to compromise significantly on the substantive issues was made so that WCX could determine whether further “steps would be fruitless” and could proceed to file the complaint. WCX was required to make all the representations required by the rule as part of the complaint. If AT&T was not willing to compromise (like WCX was, if AT&T would as well) then further steps were obviously fruitless. If AT&T was willing to compromise, then WCX would have taken yet further steps in addition to those it voluntarily took by repeatedly setting out its position and inviting responses.⁴⁹

36. WCX denies that it did not act in good faith, and reiterates that it is not alleging AT&T violated any duty of good faith negotiation or unduly delayed or stonewalled the course of negotiations. The parties have strongly-held legal and policy differences that could not be settled through negotiation and must be resolved in this adjudication. “Good faith” is not an issue.

37. WCX denies that it did not act in good faith, and reiterates that it is not alleging AT&T violated any duty of good faith negotiation or unduly delayed or stonewalled the course of negotiations. The parties have strongly-held legal and policy differences that could not be settled through negotiation and must be resolved in this adjudication. “Good faith” is not an issue.

38. Nothing in AT&T’s Answer to this paragraph requires a Reply.

⁴⁹ Second Amended Complaint pp. 333, 347, 348-349, 380-381, 390-391, 398-402.

39. WCX appreciates AT&T's ultimate admission that the parties' dispute was unlikely to be resolved through further negotiation and that both parties agreed the dispute could only be resolved through adjudication in this complaint.

40. WCX is also open to further negotiation once the impasse issues are resolved through adjudication. *See* Second Amended Complaint ¶40.

IV. Substantive Violations

41. AT&T's denials are noted. WCX disagrees and asks the Commission to resolve the questions raised in the Complaint.

42. WCX has shown that Dr. Roetter is an expert, and provides further proof in this Reply.⁵⁰ Dr. Roetter's conclusions are valid and well-reasoned and they should be accepted.

43. AT&T's denials are noted. WCX disagrees that any other agreements AT&T may have, or the terms in them,⁵¹ constitute a basis for any presumption that its proposed terms here are reasonable as to WCX. The Commission has recognized that "reasonableness" is fact-specific and what is reasonable for one carrier or set of carriers may not be reasonable for another. *Voice Roaming Order* ¶¶44-45. A voluntarily-negotiated set of terms are presumed reasonable as between the executing parties, *Data Roaming Order* ¶¶81, 86 (factors 3 and 4), but AT&T's proposed terms do not enjoy any presumption *vis a vis* WCX.

V. WCX's Proposed Terms Conditions and Prices Are Commercially Reasonable

44. WCX produced sufficient information to prove its contentions in Second Amended Complaint ¶29 concerning the circumstances underlying the creation of the RWA Model

⁵⁰ Roetter Reply Declaration p. 2, 26-33.

⁵¹ AT&T's Answer Package extensively relies on the alleged existence of other agreements to support its position. AT&T, however, did not provide any allegedly similar executed agreement as part of its Answer package. Further AT&T objected to WCX's Interrogatories 2, 4 and 5 that sought production of them. AT&T has not proven its contention they are "the same" or "similar" to the AT&T terms before the Commission in this case. Nor can AT&T insist all of these are reasonable and give rise to a presumption of reasonableness as to WCX if neither WCX nor the Commission can see them and make an independent assessment.

Agreement and its premises and goals. Nonetheless, WCX is providing more information about that topic in this Reply.⁵²

45. WCX denies that the RWA Model Agreement is not fully consistent with the purposes and goals underlying the Commission's roaming orders and rules. To the contrary, the RWA Model Agreement implements the roaming rules in far better fashion than AT&T's terms, which do not correctly reflect the rules or the reasons for them and the policies they represent.

46. The Commission will have to resolve the fundamental disagreement between the parties regarding the difference between roaming and resale. The Commission should – as it said it would do in the Second Further Notice of Proposed Rulemaking portion of the *Voice Roaming Reconsideration Order*⁵³ – “decide in the case of [this] specific dispute whether data roaming⁵⁴ should be provided in a particular instance, and on what terms, or whether the request is essentially a request for resale.”

47. AT&T contends that this case concerns only roaming arrangements for commercial mobile data services under rule 20.12(e) and does not involve automatic roaming for interconnected services under rule 20.12(d). AT&T is incorrect. AT&T must provide automatic roaming to support WCX's interconnected services, and 20.12(d) applies. WCX explains this in more detail in its Reply Legal Analysis.

48. WCX produced sufficient information to prove its contentions in Second Amended Complaint ¶48 that it “has already invested in its home area.” Nonetheless, WCX is providing

⁵² Feldman Reply Declaration pp. 88-91.

⁵³ Order on Reconsideration and Second Further Notice of Proposed Rulemaking, *In re Reexamination of Roaming Obligations of Providers*, 25 FCC Rcd. 4181, 4233, ¶89 (2010) (“*Voice Roaming Reconsideration Order*”).

⁵⁴ As explained below, WCX contends that several of its services (including VoLTE, messaging and M2M) are “interconnected” services to which AT&T's §20.12(d) automatic roaming obligations apply and thus as to those services the §20.12(e) “data roaming” rule does not apply. The Commission's past statements about backdoor ...resale were made in the context of both automatic and data roaming, so the question whether WCX is seeking “resale” rather than “roaming” applies regardless of whether §20.12(d) applies or §20.12(e) applies to any given service.

more information about that topic in this Reply.⁵⁵ AT&T mischaracterizes WCX's position and proposed terms when it asserts that WCX is seeking to "us[e] a data roaming agreement to effectively offer service to customers in areas where the provider does not have a license." First, WCX is seeking both automatic roaming under 20.12(d) (for WCX's interconnected services) and data roaming under 20.12(e) (for WCX's non-interconnected services). Second, WCX is not trying to "effectively offer service to customers in areas where WCX does not have a license." WCX is trying to provide home-based services to customers that reside in, conduct significant business in or have a physical presence in WCX's home area. But in order to be able to provide a viable home-based service WCX's service must also be in a position to support its "wireless consumers' reasonable expectations of receiving seamless⁵⁶ nationwide commercial mobile telephony services through roaming."⁵⁷ AT&T's terms expressly and obviously prevent WCX from being able to serve customers that reside in, conduct significant business in or have a physical presence in WCX's home area but also extensively travel and want to seamlessly use

⁵⁵ Feldman Reply Declaration pp. 63-80.

⁵⁶ *Voice Roaming Order* ¶3. See also *id.* ¶¶27, 28, 29, 35, 49, 55, 63, 73, 76, 81; *Voice Roaming Reconsideration Order* ¶¶1, 2, 3, 34, 42, 44, 46, 47, 48, 50, 51, 52, 53, 56, 60, 67, 70; *Data Roaming Order* ¶¶9, 11, 13, 17, 20.

⁵⁷ *Data Roaming Order* ¶15 ("Even where providers have invested in and built out broadband networks in a regional service territory, a service provider's inability to offer roaming easily can deter customers from subscribing."); ¶17 ("We are persuaded by the evidence that roaming arrangements help encourage investment by ensuring that providers wanting to invest in their networks can offer subscribers a competitive level of mobile network coverage. Roaming arrangements can help provide greater assurance to service providers that, if they make the investment to expand or upgrade their facilities, they will be able to offer competitive service options to their customers through a combination of local or regional facilities-based service and roaming arrangements."); ¶18 ("...lack of roaming can constitute a significant hurdle to new competition and can delay or deter entry into a market because a provider seeking to provide service in a new geographic area, without the ability to supplement its networks with roaming and whose initial facilities would necessarily be limited, would be required to compete with incumbents that had been developing and expanding their networks for many years."); ¶20 ("availability of roaming arrangements helps provide consumers with greater competitive choices in mobile broadband by encouraging investment and network deployments and ensuring that providers wanting to invest in their networks or to enter into a new market can offer subscribers a competitive level of mobile network coverage and service. By removing barriers to customer acquisition by providers in smaller or remote areas, the rule we adopt today will encourage greater use of spectrum and additional sustainable investment in broadband networks serving these areas."); ¶30 ("the rule will promote significant investment in facilities-based broadband networks throughout the country. As discussed above, several providers state that a data roaming obligation is necessary to provide an acceptable level of risk for the investment in data capabilities for their network, as it increases their chances of being able to offer their subscribers the nationwide coverage needed for a viable product offering.")

their WCX service while doing so. WCX wants to support home-based services that work in its home area but also have “seamless connectivity” when they are “traveling outside their home network service area.” AT&T’s belief it has an inherent right to own, control and appropriate WCX customers as its own if they spend considerable time on AT&T’s side of an invisible demarcation point while they commute to work or school, are seeking medical care or going to stores in urban areas, or employ WCX’s planned M2M service anywhere other than within WCX’s home area than AT&T has arbitrarily chosen to allow is certainly consistent with AT&T’s typical arrogance and hubris. But it is not at all supported by the roaming rules. AT&T’s “Marie Antionette response” – that WCX can’t have roaming “bread” and should “make cake” instead by spending billions of dollars to purchase more spectrum and then construct its own nationwide network – is wholly untethered from reality. The Commission specifically rejected AT&T’s similar arguments in each of the 2007,⁵⁸ 2010⁵⁹ and 2011⁶⁰ roaming decisions that control this case. AT&T’s position is not consistent with the roaming rules or the reason for them.

49. WCX produced sufficient information to prove that it has met and surpassed the Commission’s build-out requirements. Nonetheless, WCX provides more information as part of this Reply.⁶¹ The Commission will, in this adjudication, decide whether WCX’s or AT&T’s terms more faithfully implement the roaming orders.

⁵⁸ *Voice Roaming Order* ¶22. The Commission initially held that home-area automatic roaming (as contrasted with out of home area roaming) was not necessary and the lack of it would provide incentives for carriers to invest within *their home area*. *Id.* ¶46. The Commission reversed itself in the *Voice Roaming Reconsideration Order*, however and required even home-area automatic roaming with limitations. The Commission found that roaming – even home-area roaming – actually enhanced providers’ incentive and ability to expand their own *home area* networks.

⁵⁹ *Voice Roaming Reconsideration Order* ¶¶18, 21-23, 30-35.

⁶⁰ *Data Roaming Order* ¶¶15, 17, 18, 20, 30.

⁶¹ Feldman Reply Declaration pp. 63-80.

50. WCX rebuts that AT&T's contentions regarding WCX's supposed alternatives to roaming on AT&T's network as part of this Reply.⁶² Even if alternatives did exist that would bear only on the reasonableness of roaming terms; AT&T would still have the duty to provide roaming under 20.12(d) and (e). WCX is not seeking to "us[e] a data roaming agreement as a means to compete for customers that do not reside or have only a tenuous connection to WCX's service area by piggy-backing on another provider's network." AT&T mentions only data roaming in this paragraph and ignores the fact that WCX is seeking both automatic roaming under 20.12(d) (for WCX's interconnected services) and data roaming under 20.12(e) (for WCX's non-interconnected services). Second, WCX is not trying to "effectively offer service to customers in areas where WCX does not have a license." WCX is trying to provide home-based services to customers that reside in, conduct significant business in or have a physical presence in WCX's home area. But in order to be able to provide a viable home-based service WCX's service must also be in a position to support its "wireless consumers' reasonable expectations of receiving seamless⁶³ nationwide commercial mobile telephony services through roaming."⁶⁴

⁶² Feldman Reply Declaration *passim*.

⁶³ *Voice Roaming Order* ¶3. See also *id.* ¶¶27, 28, 29, 35, 49, 55, 63, 73, 76, 81; *Voice Roaming Reconsideration Order* ¶¶1, 2, 3, 34, 42, 44, 46, 47, 48, 50, 51, 52, 53, 56, 60, 67, 70; *Data Roaming Order* ¶¶9, 11, 13, 17, 20.

⁶⁴ *Data Roaming Order* ¶15 ("Even where providers have invested in and built out broadband networks in a regional service territory, a service provider's inability to offer roaming easily can deter customers from subscribing."); ¶17 ("We are persuaded by the evidence that roaming arrangements help encourage investment by ensuring that providers wanting to invest in their networks can offer subscribers a competitive level of mobile network coverage. Roaming arrangements can help provide greater assurance to service providers that, if they make the investment to expand or upgrade their facilities, they will be able to offer competitive service options to their customers through a combination of local or regional facilities-based service and roaming arrangements."); ¶18 ("...lack of roaming can constitute a significant hurdle to new competition and can delay or deter entry into a market because a provider seeking to provide service in a new geographic area, without the ability to supplement its networks with roaming and whose initial facilities would necessarily be limited, would be required to compete with incumbents that had been developing and expanding their networks for many years."); ¶20 ("availability of roaming arrangements helps provide consumers with greater competitive choices in mobile broadband by encouraging investment and network deployments and ensuring that providers wanting to invest in their networks or to enter into a new market can offer subscribers a competitive level of mobile network coverage and service. By removing barriers to customer acquisition by providers in smaller or remote areas, the rule we adopt today will encourage greater use of spectrum and additional sustainable investment in broadband networks serving these areas."); ¶30 ("the rule will promote significant investment in facilities-based broadband networks throughout the country. As discussed above, several providers state that a data roaming obligation is necessary to provide an acceptable level of risk for the investment in

AT&T's terms expressly and obviously prevent WCX from being able to serve customers that reside in, conduct significant business in or have a physical presence in WCX's home area but also extensively travel and want to seamlessly use their WCX service while doing so. WCX wants to support home-based services that work in its home area but are have "seamless connectivity" when they are "traveling outside their home network service area."

51. WCX rebuts AT&T's criticism of the RWA Model Agreement as part of this Reply. AT&T mischaracterizes WCX's position on the legal and technical differences between roaming and resale (and the conclusion that because of these differences "even greater than 90% roaming would not be resale") in an effort to undercut the reasonableness of WCX's compromise offer to limit roaming use to 50%. Note 156 (which AT&T references) is clear, however. WCX is not seeking "resale"; WCX is seeking *roaming*. In an effort to address the Commission's concerns about the potentially conflicting policy goals of meeting consumers' reasonable expectation of seamless nationwide connectivity and the desire to encourage continued investment, WCX has offered to limit roaming usage to no more than 50% of its home-area usage. That compromise will require WCX to continue improving and expanding its home-area service capabilities in order to grow its home-area consumption and also means WCX's business plan is a home-area focused plan, rather than one that primarily engages in some kind of "piggy-backing on AT&T's network."

52. The issues are joined. It is now up to the Commission to "decide in the case of [this] specific dispute whether roaming⁶⁵ should be provided in a particular instance, and on what terms, or whether the request is essentially a request for resale."⁶⁶

data capabilities for their network, as it increases their chances of being able to offer their subscribers the nationwide coverage needed for a viable product offering.")

⁶⁵ WCX's VoLTE, messaging and M2M services are or will be "interconnected" services to which AT&T's §20.12(d) automatic roaming obligations apply and thus as to those services the §20.12(e) "data roaming" rule does

53. The issues are joined. It is now up to the Commission to “decide in the case of [this] specific dispute whether roaming should be provided in a particular instance, and on what terms, or whether the request is essentially a request for resale.”⁶⁷

54. The issues are joined. It is now up to the Commission to “decide in the case of [this] specific dispute whether roaming should be provided in a particular instance, and on what terms, or whether the request is essentially a request for resale.”⁶⁸

55. The issues are joined. It is now up to the Commission to “decide in the case of [this] specific dispute whether data roaming should be provided in a particular instance, and on what terms, or whether the request is essentially a request for resale.”⁶⁹ WCX is not seeking “resale”; WCX is seeking *roaming*. In an effort to address the Commission’s concerns about the potentially conflicting policy goals of meeting consumers’ reasonable expectation of seamless nationwide connectivity and the desire to encourage continued investment, WCX has offered to limit roaming usage to no more than 50% of its home-area usage. That compromise will require WCX to continue improving and expanding its home-area service capabilities in order to grow its home-area consumption and also means WCX’s business plan is a home-area focused plan, rather than one that primarily engages in some kind of “piggy-backing on AT&T’s network.”

56. The issues are joined. It is now up to the Commission to “decide in the case of [this] specific dispute whether data roaming should be provided in a particular instance, and on what

not apply. The Commission’s past statements about roaming versus resale were made in the context of both automatic and data roaming, so the question whether WCX is seeking “resale” rather than “roaming” applies regardless of whether §20.12(d) applies or §20.12(e) applies to any given service.

⁶⁶ Order on Reconsideration and Second Further Notice of Proposed Rulemaking, *In re Reexamination of Roaming Obligations of Providers*, 25 FCC Rcd. 4181, 4233, ¶89 (2010) (“*Voice Roaming Reconsideration Order*”).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

terms, or whether the request is essentially a request for resale.”⁷⁰ WCX is not seeking “resale”; WCX is seeking *roaming*. WCX has offered to limit roaming usage to no more than 50% of its home-area usage. That compromise will require WCX to continue improving and expanding its home-area service capabilities in order to grow its home-area consumption and also means WCX’s business plan is a home-area focused plan, rather than one that primarily engages in some kind of “piggy-backing on AT&T’s network.”

57. WCX produced sufficient information to prove that it is already offering data and other services in its home area using its own spectrum and facilities. Nonetheless, WCX provides more information as part of this Reply.⁷¹ The issues are joined. It is now up to the Commission to “decide in the case of [this] specific dispute whether data roaming should be provided in a particular instance, and on what terms, or whether the request is essentially a request for resale.”⁷² WCX is not seeking “resale”; WCX is seeking *roaming*.

58. The issues are joined. It is now up to the Commission to “decide in the case of [this] specific dispute whether data roaming should be provided in a particular instance, and on what terms, or whether the request is essentially a request for resale.”⁷³ WCX is not seeking “resale”; WCX is seeking *roaming*. WCX has offered to limit roaming usage to no more than 50% of its home-area usage. That compromise will require WCX to continue improving and expanding its home-area service capabilities in order to grow its home-area consumption and also means WCX’s business plan is a home-area focused plan, rather than one that primarily engages in some kind of “piggy-backing on AT&T’s network.”

⁷⁰ *Id.*

⁷¹ Feldman Reply Declaration *passim*.

⁷² *Id.*

⁷³ *Id.*

59. AT&T admits the census information shows that 21.5% of the population in one county in WCX's area spends the day in locations outside the county, and 59.3% of the "workers" in that county do a daily commute. It then denies the undeniable proposition that "[i]f one assumes that WCX's user base is representative of the population base, AT&T's proposed terms would immediately put WCX in breach, both in terms of total percentage of devices and total percent of use." AT&T is clearly wrong.

60. AT&T denies that its proposed terms "would require WCX to contractually mandate that the Account owner confiscate all devices from any employee or family member if the employee or family member goes on the road for a month." AT&T denies that "[a]n employer would not buy WCX's service for employees if they travel for extended periods. For example an oil servicing company based in Bastrop with employees working on-site throughout the Eagle Ford Shale could not buy WCX's service." AT&T denies that "[a] parent would not buy WCX's service for use by college-bound family members at Texas A&M, Texas State or the University of Texas even though each of those university campuses is within 25 miles of WCX's CMA." AT&T denies that "Spouses that commute are also prohibited." AT&T denies that AT&T's restrictions wholly destroy the entire reason to have multiple accounts per plan and eliminate mobility as a truly useable option to WCX's customers. But AT&T stops after serially denying. Nowhere does AT&T explain exactly why WCX is wrong in its contention or show how its proposed terms do not in fact prohibit above-described activity or obtain that result. AT&T's only defense is that it has terms with other provider containing the same restrictions. The other providers may or may not have chosen to voluntarily accept those terms, but they now have to live with them if they can. WCX, however, has challenged these restrictions because it does not want to suffer from them and believes they are not reasonable. AT&T's terms do not come with

any presumption of reasonableness *vis a vis* WCX. The Commission now gets to interpret and apply the roaming rules and associated orders, and establish contract terms consistent with them after consideration of the particular facts and circumstances of this case.

61. If and to the extent AT&T proposes to manage WCX's traffic beyond what is necessary to protect network security or deal with congestion, then the parties do "materially disagree." If and to the extent AT&T proposes to violate WCX users' privacy by inspecting the content of their communications, then the parties do "materially disagree." WCX agrees that AT&T has a right to protect its network from harm, and must manage traffic when congestion occurs. The Commission so held in *Data Roaming Order* ¶¶8, 23, 35, 40. The Commission also expected there to be express coverage of those topics in an agreement, but AT&T's proposed terms do not address them. AT&T likely preferred silence to explication because it could then do whatever it wanted, which likely included "regulation" of WCX's traffic for reasons far afield from legitimate network security or congestion management concerns.⁷⁴ AT&T's terms limit or ban (AT&T says it want to "regulate"⁷⁵) applications and services for purely self-interested competitive reasons that have no relation to security or congestion management. AT&T wants to prohibit WCX from offering specific services to others.⁷⁶ This is a topic where terms are required, just like the Commission expressly said in *Data Roaming Order* ¶40.

62. There are disputes concerning "service awareness." AT&T's provisions mention that topic several times, and impose specific obligations regarding service awareness. WCX's terms state there shall initially be no service awareness and while they provide for voluntary

⁷⁴ See Meadors Declaration ¶11.

⁷⁵ *Id.*

⁷⁶ Meadors Declaration ¶39 (confidential; describing one type of prohibition); Meadors Declaration ¶41 (admitting AT&T's terms prohibit M2M use while roaming); Meadors Declaration ¶46 (admitting that AT&T's usage restrictions are designed to provide an incentive to "invest" and not mentioning congestion or network security concerns).

negotiation over service awareness in the future they do not mandate the result or provide a trigger for negotiations. Further, WCX believes that AT&T does in fact intend to immediately monitor and regulate usage when roaming begins, and AT&T will use its surveillance to make determinations regarding what type of application or service is being used despite what is said in its proposed terms about availability or non-availability of service awareness.

63. AT&T denies AT&T inspection of the content of WCX users' communications would constitute an invasion of privacy and intrusion on WCX user's property rights to their own information. AT&T seems to be saying that AT&T, not WCX or WCX users, owns all rights to the content of communications. AT&T seems to be saying that users have no property rights to their private information. WCX disagrees. WCX contends that any terms allowing AT&T to inspect the content of WCX users' communications would authorize an invasion of privacy and a taking. It would be a trespass. Any such terms would be patently unreasonable as a matter of law.

64. AT&T disputes WCX's calculation of the current prevailing retail rate. WCX believes its calculation is correct, but is willing to defer to the Commission's judgment and finding of what the current retail rate is after receipt of all the evidence. WCX has proposed \$0.0096 per MB (rounded up to \$10 per GB) based on its assessment of the current price. If the Commission finds the prevailing rate is actually some higher or lower amount, then the Commission-determined amount should be the price used for purposes of the agreement. Then, the price should be adjusted going forward "as both data usage increases and the resulting Prevailing Industry Retail Rate decreases." RWA Model Agreement, Exhibit 2.

65. AT&T denies the assertion regarding the rough cost approximation WCX indicated it would incur under AT&T's proposed terms when an individual user "roamed for 3GB of their monthly 10GB plan." The math, however, is relatively straightforward. This customer would

have roamed 30% of the time and had home-based service 70% of the time and the 30% would be in excess of the amount allowed by AT&T's terms for both accounts and devices. The 30% roaming use by this one user would cause WCX to be in breach of the agreement. If AT&T chose to not suspend or entirely cancel the agreement and instead recover the penalty rate then the calculation presented by WCX is actually quite conservative. The remaining denials are noted, and WCX disagrees with them.

66. AT&T is correct that this is legal argument. WCX, like AT&T will analyze the issues in its Reply Legal Analysis.

67. AT&T denies Dr. Roetter's opinions and conclusions, and refers to the Orszag Declaration. Dr. Roetter's Reply Declaration rebuts Orzag.

68. AT&T denies Dr. Roetter's opinions and conclusions, and refers to the Orszag Declaration. Dr. Roetter's Reply Declaration rebuts Orzag. WCX's Reply Legal Analysis addresses AT&T's legal analysis.

VI. AT&T Mobility's Proposed Terms Conditions and Prices Are Not Commercially Reasonable

69. No Reply is necessary.

A. AT&T's Proposed Terms relating to billing, audits and suspension during dispute resolution are commercially unreasonable and lack measurement criteria; any prohibition on FCC resolution of disputes is commercially unreasonable

70. AT&T disputes that WCX's compromise-based 50% roaming usage limit is easy to administer and reduces potential disputes. AT&T also asserts that the 50% roaming usage limit is "aspirational" and not a material term or binding. AT&T is incorrect. If a party does not meet its obligation to endeavor to provide a majority of use on its own network then that would be a material breach.

i. Dispute resolution

71. AT&T contends that a Commission-imposed contract term can force a party to waive the right to seek Commission relief or judicial intervention, in order to prevent irreparable harm or if a party claims the other party has violated the contract, the Act or a Commission rule. In other words AT&T claims that an administrative agency can compel an unwilling party to “agree” to contract terms providing for compulsory commercial arbitration as the exclusive means of dispute resolution. AT&T wants this Commission to order WCX to waive its right to invoke the Commission’s jurisdiction and WCX’s constitutional right⁷⁷ to a jury trial under the Seventh Amendment of the Constitution. WCX agrees that parties can voluntarily waive these rights and agree to binding arbitration, as part of a consensual contract. WCX agrees that the two parties could have mutually agreed to a compulsory arbitration provision or any other provisions waiving rights. But the contested terms arising from this proceeding will not be voluntary or consensual; they will be imposed by the Commission over the objection of one side or the other. “Binding commercial arbitration is a matter of consent, not coercion.”⁷⁸ In the §252 interconnection agreement “arbitration” context the courts have approved state commission imposed terms allowing optional commercial arbitration, but mandatory binding arbitration cannot be compelled on an objecting party. *Compare, MCI Telcoms. Corp. v. Pacific Bell*, 1998 U.S. Dist. LEXIS 17556 *97-*98 (N.D. Cal. Sept. 29, 1998) (binding commercial arbitration optional, not mandatory, and thus acceptable) *with Verizon N.Y., Inc. v. Covad Communs. Co.*, 2006 U.S. Dist. LEXIS 7414 *12-21 (N.D.N.Y Feb. 3, 2006) (binding commercial arbitration mandatory and inconsistent with federal law). The Commission has broad and sweeping powers and a considerable amount of discretion, to be sure. But it does not have the authority to coercively eliminate a party’s statutory rights to administrative and judicial review of any future

⁷⁷ One can only imagine AT&T’s hue and cry if one of Commission’s prescribed terms in this case provided that AT&T “consents” to a waiver of the right to appeal when it has not in fact done so.

⁷⁸ *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

disputes, or completely delegate the Commission's statutory jurisdiction to a private body of alternative dispute resolution professionals.

72. AT&T's arguments in paragraph 72 again state the position that the Commission can impose compulsory commercial arbitration over a party's objection. WCX disagrees, as explained above.

73. AT&T's arguments in paragraph 72 again state the position that the Commission can impose compulsory commercial arbitration over a party's objection. WCX disagrees, as explained above. It is true that the Commission has endorsed voluntary contract terms employing commercial arbitration. *See, e.g., Data Roaming Order* ¶83. But the Commission was referring to voluntary agreements achieved through bilateral negotiation, not terms in an agreement imposed by the Commission as part of a roaming complaint. The Commission there said it would not mandate binding commercial arbitration. AT&T is now asking the Commission to mandate binding commercial arbitration.

ii. Suspension during dispute resolution

74. AT&T largely defers discussion of suspension during dispute resolution to its Legal Analysis. WCX's reply to AT&T's Legal Analysis appears in part IX.C of this reply submission. WCX notes that AT&T agreed with WCX that actual negotiation of this particular topic would not be fruitful unless and until determinations by the Commission on the principal issues of dispute. *See* AT&T Response ¶39.

75. WCX's contentions regarding the prejudice to WCX if AT&T is able to cut off WCX's ability to support roaming during any dispute resolution have a reasonable basis in fact and are frankly self-evident. While it is true the RWA Model Agreement also contains limits on liability, they are reasonable because the RWA Model Agreement does not contemplate suspension during

dispute resolution. The point was that AT&T could suspend service and irreparably harm WCX during a dispute resolution. Even if WCX was later vindicated it would not be able to recover adequate damages. WCX's proposed terms do not present this problem. AT&T's terms, however, do present this problem. Further, AT&T's terms contemplate disconnection for reasons that go far beyond those discussed in *Data Roaming Order* ¶85 and note 242. That paragraph approved suspension to protect the host network from harm or congestion,⁷⁹ not a "breach" for "excessive" use or roaming involving a "prohibited" use such as M2M or resale.

iii. Auditing

76. WCX continues to believe auditing provisions are not necessary if the RWA Model Agreement is used. But if usage restrictions are allowed beyond the simple "majority of usage on own network" criterion⁸⁰ and if there are going to be audit provisions then WCX contends that it must be informed in advance – through specific contract terms – regarding the information it must maintain and be ready to produce in the event of an audit. WCX's concern is that AT&T will reject the information WCX has maintained and produced and contend other information should have been maintained.

77. WCX continues to believe auditing provisions are not necessary if the RWA Model Agreement is used. But if usage restrictions are allowed beyond the simple "majority of usage on own network" criterion and if there are going to be audit provisions then WCX contends that it must be informed in advance – through specific contract terms – regarding the information it must maintain and be ready to produce in the event of an audit. WCX's concern is that AT&T will reject the information WCX has maintained and produced and contend other information

⁷⁹ "The record indicates that providers already commonly include in their negotiated roaming agreements terms that give a host provider the ability to suspend roaming service if roaming becomes impractical for reasons such as overload, outage, or other operational or technical issues." (emphasis added).

⁸⁰ As explained in ¶70 above the "majority of usage on own network" criterion is not merely "aspirational."

should have been maintained. WCX notes that AT&T agreed with WCX that actual negotiation of this particular topic would not be fruitful unless and until determinations by the Commission on the principal issues of dispute. See AT&T Response ¶39.

B. Any implicit build-out requirements in addition to and more demanding than those reflected in the FCC's rule-based build-out requirements are commercially unreasonable

78. WCX disagrees with AT&T's claim that WCX has not supplied sufficient "documentary support." WCX nonetheless provides more information about its network, services and business plans in this Reply.⁸¹ The parties disagree regarding the Commission's intent and the policy it is trying to implement in the roaming orders, both with regard to permitted roaming use and the incentives for further investment within and without the home provider's licensed area. AT&T's repeated claims that WCX is unreasonably seeking to "piggy-back" on AT&T's network are unfounded and mischaracterize the Commission's roaming orders and rules and in particular misstate the Commission's discussion in *Data Roaming Order* ¶21.

79. AT&T's denials in ¶79 are weak and easily dispatched. The Feldman and Roetter Reply Declarations vanquish AT&T's position.

C. No service and use restrictions on WCX roaming-enabled services

80. No Reply is necessary.

81. WCX presented a lot of evidence concerning its plans and desires relating to M2M. WCX presents more evidence on these issues as part of this Reply package.⁸² AT&T's contention that the roaming orders do not contemplate roaming use of applications like M2M is flatly incorrect.

82. WCX presented a lot of evidence concerning M2M technology and the fact that roaming is and will be a significant requirement small providers and new entrants that wish to participate

⁸¹ Feldman Reply Declaration *passim*.

⁸² Feldman Reply Declaration pp. 16-40; 53-63.

in the market opportunities. WCX presents more evidence on these issues as part of this Reply package, including a rebuttal of AT&T's contention that WCX can participate in the market using only its own network or through resale.⁸³ AT&T's repeated claims that WCX is unreasonably seeking to "piggy-back" on AT&T's network are unfounded and mischaracterize the Commission's roaming orders and rules and in particular misstate the Commission's discussion in *Data Roaming Order* ¶21. AT&T's terms are a barrier to entry and an effort to engage in market foreclosure.

83. AT&T's discussion in this paragraph finally exposes AT&T's true position: M2M should not be an eligible roaming use.⁸⁴ WCX, of course, disagrees. AT&T's repeated claims that WCX is unreasonably seeking to "piggy-back" on AT&T's network are unfounded and mischaracterize the Commission's roaming orders and rules and in particular misstate the Commission's discussion in *Data Roaming Order* ¶21.

84. AT&T mischaracterizes WCX's position. WCX is seeking to participate in the nationwide market, but it will do so by providing service to customers that have a legitimate connection to WCX's home area (such as residency, conduct significant business, physical presence) and purchase WCX's home-based service. AT&T's repeated claims that WCX is unreasonably seeking to "piggy-back" on AT&T's network are unfounded and mischaracterize the Commission's roaming orders and rules and in particular misstate the Commission's discussion in *Data Roaming Order* ¶21.

85. AT&T's discussion in this paragraph finally exposes AT&T's true position: M2M should not be an eligible roaming use. WCX, of course, disagrees. AT&T's repeated claims that WCX is unreasonably seeking to "piggy-back" on AT&T's network are unfounded and mischaracterize

⁸³ Feldman Reply Declaration pp. 20-23, 24-40, 43.

⁸⁴ AT&T relegates M2M to "data roaming" but as explained elsewhere, M2M can also be part of an "interconnected" service and therefore subject to automatic roaming.

the Commission's roaming orders and rules and in particular misstate the Commission's discussion in *Data Roaming Order* ¶21. WCX presented a lot of evidence concerning M2M technology and the fact that roaming is and will be a significant requirement for small providers and new entrants that wish to participate in the market opportunities. WCX presents more evidence on these issues as part of this Reply package, including a rebuttal of AT&T's contention that WCX can participate in the market using only its own network or through resale.

86. AT&T largely defers discussion of WCX's contentions to its Legal Analysis. WCX's reply to AT&T's Legal Analysis appears in part IX.C of this reply submission. WCX presented a lot of evidence concerning M2M technology and the fact that roaming is and will be a significant requirement for small providers and new entrants that wish to participate in the market opportunities. WCX presents more evidence on these issues as part of this Reply package, including a rebuttal of AT&T's contention that WCX can participate in the market using only its own network or through resale.

87. AT&T largely defers discussion of WCX's contentions to its Legal Analysis. WCX's reply to AT&T's Legal Analysis appears in part IX.C of this reply submission. AT&T's denials are noted, and rejected.

D. Any AT&T surveillance of WCX users' content or applications through service awareness would be commercially unreasonable

88. There are disputes concerning "service awareness." AT&T's provisions mention that topic several times, and impose specific obligations regarding service awareness. WCX's terms state there shall initially be no service awareness and while they provide for voluntary negotiation over service awareness in the future they do not mandate the result or provide a trigger for negotiations. Further, WCX believes that AT&T does in fact intend to immediately monitor and regulate usage when roaming begins, and AT&T will use its surveillance to make

determinations regarding what type of application or service is being used despite what is said in its proposed terms about availability or non-availability of service awareness. AT&T's contention that its plans to surveil the content of roamers' communication "has nothing to do" with any issue in this case is flatly untrue. AT&T on the one hand says the issue is irrelevant, but on the other hand appears to admit its proposed terms address the issue (making it relevant), but still will not identify which of its terms do operate to allow it to surveil the content of WCX users' communications.

89. WCX notes that AT&T agreed with WCX that actual negotiation of this particular topic would not be fruitful unless and until determinations by the Commission on the principal issues of dispute. See AT&T Response ¶39. Nonetheless, this is a significant issue and absent agreement by the parties it is one that must be resolved.

90. WCX's assertion that "AT&T has no reason to know or try to know what the datagrams represent, by way of the application or service being employed by the WCX user and certainly AT&T has absolutely no reason or justification for looking at the content of the communications, thereby unreasonably invading the privacy of WCX's users without their consent and appropriating their property" is clear and easily comprehensible. AT&T effectively admits that it wants to reserve the right to inspect content or engage in application management for reasons other than network security or congestion control. WCX continues to assert any terms allowing it to do so are not reasonable. AT&T asserts that its "traffic monitoring provisions" are "commercially reasonable" but does not identify which of its terms relate to, and authorize, "traffic monitoring."

91. AT&T asserts that its "traffic monitoring provisions" are "commercially reasonable" but does not identify which of its terms relate to, and authorize, "traffic monitoring."

VII. AT&T Mobility's Roaming Prices Do Not Comply with CMRS Rules and Are Not Commercially Reasonable

92. AT&T's denials are noted and rejected. AT&T otherwise defers discussion of WCX's contentions to its Legal Analysis. WCX's reply to AT&T's Legal Analysis appears in part IX.C of this reply submission.

93. AT&T's claim that WCX's assertion seeking Commission analysis of all price affecting terms for reasonableness is incomprehensible has no basis. The request was clear.

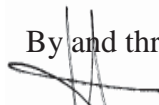
VIII. Prayer for Relief

94. AT&T's denial that WCX is entitled to any relief is noted and rejected.

Respectfully Submitted,

WORLD CALL INTERCONNECT, INC. a/k/a
Evolve Broadband

By and through counsel:



W. SCOTT MCCOLLOUGH

wsmc@dotlaw.biz

Matthew A. Henry

henry@dotlaw.biz

MCCOLLOUGH|HENRY PC

1290 S. Capital of Texas Hwy Bldg 2-235

West Lake Hills TX 78746

512.888.1112 (V)

512.692.2522 (FAX)